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Guy M. Hicks  
General Counsel

December 7, 2001

OFFICE OF THE  
EXECUTIVE SECRETARY  
615 214 6301  
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VIA HAND DELIVERY

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth  
Telecommunications, Inc.*

*Complaint of Access Integrated Networks, Inc. Against BellSouth  
Telecommunications, Inc.*

Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to Motion to Make Documents Public. BellSouth intends to file an affidavit in support of its Response. Due to the schedule and availability of BellSouth personnel, BellSouth will be unable to file the affidavit until early next week. Copies of the enclosed have been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch  
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee**

In Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Docket No. 01-00868

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
RESPONSE TO MOTION TO MAKE DOCUMENTS PUBLIC**

BellSouth Telecommunications, Inc. ("BST") respectfully submits its Response to the Motion to Make Documents Public ("Motion") that Access Integrated Networks, Inc. ("AIN") and XO Tennessee, Inc. ("XO") filed on or about November 30, 2001.

**I. ARGUMENT**

The Administrative Procedures Act provides that at the request of any party, an administrative judge or hearing officer shall issue protective orders in accordance with the Tennessee Rules of Civil Procedure. See T.C.A. §4-5-311(a). Consistent with this statutory authority,<sup>1</sup> the Hearing Officer entered a Protective Order that prevents the public disclosure of documents that a party designates as confidential information constituting "trade secrets, confidential research, development, financial statements or other commercially sensitive information . . . ." See Protective Order at ¶1. Pursuant to that Protective Order, BST designated certain documents it produced in response to Staff Request No. 7 and AIN/XO Request No.

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<sup>1</sup> XO and AIN are simply mistaken when they claim that T.C.A. §65-3-109 is the only statute that gives the TRA the power to keep documents confidential. See Motion at 2.

5 as confidential information, and XO and AIN have asked the Hearing Officer to allow the public disclosure of these documents. These documents fall into two general categories: (1) documents that were sent to existing or potential customers (i.e. contracts, proposals, letters, and e-mails); and (2) training materials and marketing scripts. For the reasons explained below, the Hearing Officer should deny XO's and AIN's request to allow public disclosure of these documents.

**A. The documents that were sent to customers contain customer proprietary network information that is protected from public disclosure by the Federal Telecommunications Act of 1996.**

As XO and AIN note, many of the documents that BellSouth designated as confidential in responding to Staff Request No. 7 were delivered to customers. See Motion at 2. The vast majority of such documents, however, contain information such as the name of the business customer to whom the offer was extended and the telephone number of that business customer, and the Federal Telecommunications Act of 1996 ("the Act") imposes upon every telecommunications carrier the duty to protect the confidentiality of this type of customer information. See 47 U.S.C. §222(a). Additionally, many of these documents contain account information regarding business customers and/or telecommunications services to which business customers subscribe or have subscribed. In addition to being customer information covered by section 222(a) of the Act, such information also is customer proprietary network information ("CPNI"), and the Act generally prohibits the public disclosure of CPNI. See *id.*,

§222(c). BST's designation of these documents as confidential information under the Protective Order, therefore, is entirely appropriate.<sup>2</sup>

This designation does not hamper the ability of XO or AIN to use these documents to present its case in this docket. Paragraph 8 of the Protective Order, for instance, allows AIN or XO to disclose these documents in testimony and to offer them into evidence provided that they give BellSouth and the TRA prior notice of their intention to do so in order that "appropriate measures can be taken . . . to protect the confidential nature of the information." XO's and AIN's request to publicly disclose these documents, therefore, should be rejected.

**B. The training materials and marketing scripts are trade secrets and commercially sensitive information that is entitled to confidential treatment under the Protective Order.**

The training materials BST designated as confidential information go beyond merely summarizing the terms and conditions of the offerings presented to the customer. These training materials include procedures for efficiently processing orders, and many of them include information about which internal BST systems to use and which codes to use to process orders.<sup>3</sup> Some of these materials contain

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<sup>2</sup> To the extent that XO and AIN identify any such documents that contain no customer information or CPNI, BST is willing to consider withdrawing its designation of those documents as confidential information. Additionally, if XO and AIN wish to redact such information from documents it plans to use during any hearings that may be held in this docket, BellSouth is willing to review the redacted versions of the documents and consider withdrawing its designation of the redacted versions as confidential information.

<sup>3</sup> In this age of computer viruses and hackers, it clearly is in the public interest to protect this type of information from public disclosure. Additionally, the mechanics of processing orders are not an issue in this Docket.

BST market share information not only for the State of Tennessee as a whole, but also for specified Metropolitan Statistical Areas.<sup>4</sup> Some of these materials also explain BST's business plans and strategy to the BST representatives who are responsible for making these offerings to customers.

Similarly, the marketing scripts BST designated as confidential information go beyond merely summarizing the terms and conditions of the offering that will be presented to a customer. These scripts advise BST representatives on how best to explain the benefits of the offering to potential customers under various scenarios, often in strategic flowchart form. They anticipate questions and concerns that customers may raise regarding the offering, and they provide suggested methods of addressing such questions and concerns.

These training materials and marketing scripts clearly are compilations of information that are used in BST's business and that give BST an opportunity to obtain an advantage over competitors who do not use them. For that reason, BellSouth takes measures to ensure that such information is disseminated internally only to those with a need to know, to protect such information from public disclosure, and to protect such information when it is required to be filed in a public forum. This is exactly the type of material that is entitled to protection from public disclosure under Tennessee law.

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<sup>4</sup> CLECs have consistently claimed that similar information, such as information that is contained in or that could be derived from their wireline activity reports, is confidential.

Tennessee courts have noted that "the weight of modern authority . . . holds that a trade secret may consist of *any* formula, process, pattern, device or *compilation of information* that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." See *Hickory Specialties, Inc. v. B&L Laboratories, Inc.*, 592 S.W.2d 583, 586 (Tenn. Ct. App. 1979)(emphasis added). Accord *Heyer-Jordan & Assoc. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990). Tennessee courts also have defined trade secrets as "information used in the conduct of one's business which is of a competitive advantage and is not disclosed to the public," *Data Processing Equipment Corp. v. Martin*, 1987 WL 30155 (Tenn. Ct. App. 1987), and they have recognized that "an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer . . . ." *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 645 (Tenn. Ct. App. 2000)(emphasis in original). The training materials and marketing scripts BST has designated as confidential information clearly meet these criteria.

### CONCLUSION

As explained above, the documents that BST has designated as confidential information are the type of materials that are entitled to confidential treatment under Tennessee law.<sup>5</sup> The Hearing Officer, therefore, should deny XO and AIN's Motion to Make Documents Public.

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<sup>5</sup> AIN and XO appear to argue that these documents are not entitled to confidential treatment

Respectfully submitted,

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because they allegedly are "evidence of illegal activity." See Motion at 2. Even if the TRA had jurisdiction to determine whether a given course of conduct is "illegal" (which it does not), the TRA clearly could not make that determination prior to a hearing. Yet that is exactly what XO and AIN are asking the Hearing Officer to do: determine that BST has engaged in "illegal activity," make documents public on that basis, and then preside over a hearing to determine whether BST has engaged in "illegal activity." The cart simply cannot be put in front of the horse in the manner that XO and AIN appear to suggest.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☒ Facsimile
- ☐ Overnight

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- ☐ Hand
- ☐ Mail
- ☒ Facsimile
- ☐ Overnight

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A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line.